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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,  
8 Plaintiff,

9 -vs-

10 BRIAN E. RATIGAN,

11 Defendant.

NO. CR-97-0066-WFN-1

ORDER

12  
13 Before the Court is Mr. Ratigan's pro se Motion to Take Judicial Notice of Facts  
14 Pursuant to Fed. R. Evid. 201, filed September 29, 2008 (Ct. Rec. 272) and Motion to Alter,  
15 Amend, or Reconsider Judgment Pursuant to Fed. R. Civ. P. 59(e), filed September 29, 2008  
16 (Ct. Rec. 271). Mr. Ratigan asserts that the Court should reconsider its September 15, 2008  
17 Order finding that his Rule 60(b)(4) Motion was procedurally defaulted. Mr. Ratigan  
18 requests the Court to overrule the Ninth Circuit's determination and instead rely on the  
19 Court's initial determination that he was not procedurally defaulted.

20 The Court has reviewed file and the Motion and is fully informed. For the reasons  
21 stated below the Motion is denied.

22 **BACKGROUND**

23 Movant was indicted on April 9, 1997 for: Count 1-Conspiracy (18 U.S.C. § 371);  
24 Count 2-Destruction of a Planned Parenthood Clinic (18 U.S.C. § 844(i); Count 7-Use and  
25 Carrying of a Firearm (Pipe Bomb) in Relation to the Destruction of the Planned Parenthood  
26 Clinic on July 12, 1996 (18 U.S.C. § 924(c)(1)); Count 8-Armed Bank Robbery of the

1 US Bank on July 12, 1996 (18 U.S.C. § 2113(a) and (d)); and Count 9-Use and Carrying of  
2 a Firearm in Relation to the Bank Robbery (18 U.S.C. § 924(c)(1)) (Ct. Rec. 14).

3 A jury trial was held September 19, 1997 through September 30, 1997. The jury found  
4 the Movant guilty on all counts (Ct. Rec. 135). Movant was sentenced by this Court on  
5 December 2, 1997, to 663 months incarceration; five years supervised release; restitution of  
6 \$118,394.72; and a special assessment of \$500 (Ct. Rec. 153).

7 Mr. Ratigan appealed his conviction to the Ninth Circuit Court of Appeals. On  
8 May 21, 1999, the Ninth Circuit affirmed Mr. Ratigan's conviction. His Petition for  
9 Rehearing was denied on July 7, 1999, and his suggestion for rehearing *en banc* was rejected  
10 by the Ninth Circuit. On November 15, 1999, the Supreme Court of the United States denied  
11 Mr. Ratigan's Petition for Certiorari.

12 Movant filed a 28 U.S.C. § 2255 Motion on November 20, 2000 (Ct. Rec. 219). The  
13 Motion was denied by this Court on August 1, 2001 (Ct. Rec. 225). The Court's denial of the  
14 Motion was affirmed on appeal. *United States v. Ratigan*, 351 F.3d 957 (9th Cir. 2003) ;  
15 Mandate filed March 22, 2004 (Ct. Rec. 238). In the Ninth Circuit's opinion, the court held  
16 that Mr. Ratigan's claims were procedurally defaulted.

17 Movant's subsequent request for a writ of mandamus and to file a second or successive  
18 28 U.S.C. § 2255 motion was also denied by the Ninth Circuit. Order filed March 2, 2006  
19 (Ct. Rec. 246).

20 On August 14, 2006, Movant filed another § 2255 Motion. This Court found that it  
21 was without authority to address the Motion and transferred it to the Ninth Circuit Court of  
22 Appeals. Order filed 9/13/06, Ct. Rec. 257. The case summary from the Court of Appeals  
23 shows that the Ninth Circuit denied Mr. Ratigan's application for leave to file a second or  
24 successive petition by order dated May 15, 2007.

25 On June 4, 2007, Mr. Ratigan filed another Post-Conviction - 2255 (Ct. Rec. 259)  
26 which this Court again found it was without authority to address and transferred it to the

1 Ninth Circuit Court of Appeals. Order filed 6/7/07 (Ct. Rec. 260). On July 16, 2007, he also  
 2 filed a motion pursuant to Federal Rule of Civil Procedure 60(b) (Ct. Rec. 261). This Court  
 3 similarly transferred this motion to the Ninth Circuit Court of Appeals. Order filed 7/31/07,  
 4 Ct. Rec. 262. The Circuit denied Mr. Ratigan's application to file a second or successive  
 5 petition. Ct. Recs. 263 and 264.

### 6 **DISCUSSION**

7 Mr. Ratigan requests that this Court in effect overrule the Ninth Circuit's determination  
 8 that his claim was procedurally defaulted. He asks the Court to rely on its own determination  
 9 which was overruled by the Ninth Circuit arguing that the Ninth Circuit committed a  
 10 manifest injustice in its' determination. Unfortunately, even if the Court agreed with Mr.  
 11 Ratigan, it cannot overrule the Ninth Circuit's opinion. Only the Supreme Court or an en  
 12 banc panel of the Ninth Circuit has that power. Thus, though the Court recognizes that Mr.  
 13 Ratigan correctly reads this Court's earlier order finding that he had not procedurally  
 14 defaulted, this Court lacks the ability to alter the Ninth Circuit's decision.

### 15 **CERTIFICATE OF APPEALABILITY**

16 Although it may not be required, this Court will assume that an appeal of this Order  
 17 may not be taken unless this Court or a Circuit Justice issues a certificate of appealability,  
 18 finding that "the applicant has made a substantial showing of the denial of a constitutional  
 19 right." 28 U.S.C. § 2253(c)(2) (West 2008). This requires a showing that "reasonable jurists  
 20 would find the district Court's assessment of the constitutional claims debatable or wrong."  
 21 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If a claim is dismissed on procedural grounds  
 22 the Court must determine whether

23 jurists of reason would find it debatable whether the petition states a valid claim  
 24 of the denial of a constitutional right and that jurists of reason would find it  
 debatable whether the district court was correct in its procedural ruling.

25 *Slack*, 120 S. Ct. at 1604. A certificate of appealability should not be granted unless both  
 26 components, one directed at the underlying constitutional claims, and the second directed at

1 the court's procedural holding, are satisfied. *Id.* The Court may address either the  
2 constitutional or procedural issue first. *Id.* Based on the Court's preceding analysis, the  
3 Court concludes: (1) that the Movant has failed to make a substantial showing of a denial of  
4 a constitutional right and (2) that jurists of reason would not find it debatable whether the  
5 Court was correct in any substantive or procedural ruling. Thus a certificate of appealability  
6 should not issue. Accordingly,

7 **IT IS ORDERED** that:

8 1. Mr. Ratigan's pro se Motion to Take Notice of Facts Pursuant to Fed. R. Evid. 201,  
9 filed on September 29, 2008, **Ct. Rec. 272**, is **GRANTED**.

10 2. Mr. Ratigan's pro se Motion to Alter, Amend, or Reconsider Judgment Pursuant  
11 to Fed. R. Civ. P. 59(e), filed September 29, 2008, **Ct. Rec. 271**, is **DENIED**.

12 3. The District Court Executive is directed to:

- 13 (a) File this Order;  
14 (b) Send a copy to Mr. Ratigan and the Government; and  
15 (c) Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice  
16 of Appeal that a certificate of appealability is **DENIED**.

17 **DATED** this 7th day of November, 2008.

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19  
20 11-06

s/ Wm. Fremming Nielsen  
WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE